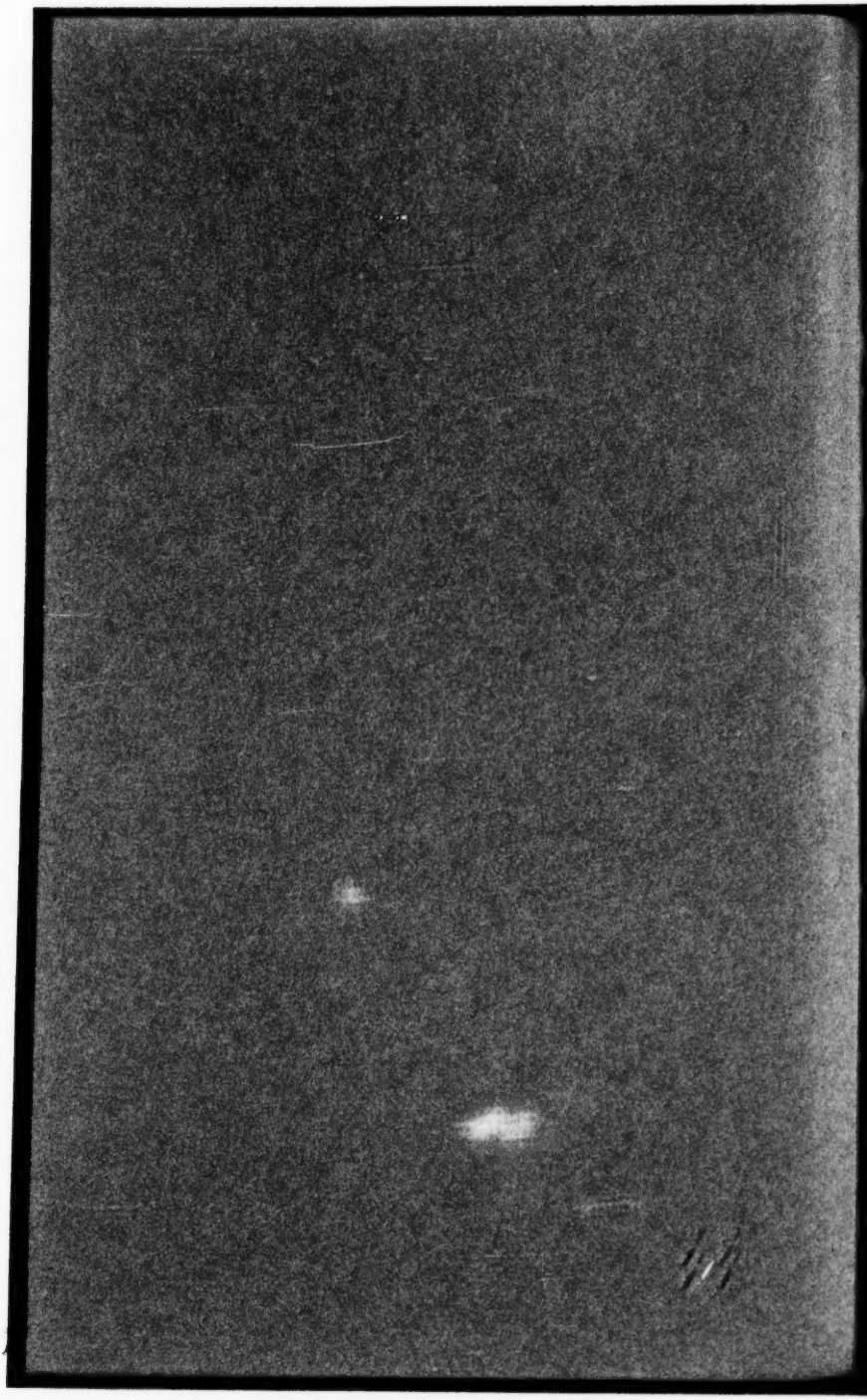

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In the Supreme Court of the United States

October Term, 1951
No. 718

JEROME DWORSKY, ZOLLIE DWORSKY, PETER DWORSKY and HARRY DWORSKY, Individually and as Co-partners, Doing Business as North Union Co., GRACE B. WRIGHT, LOUIS SACHS, JOSEPH L. NATHANSON and CARL K. LIFSON, Petitioners,

vs.

C. E. WARNER, as Trustee in Bankruptcy of Hyman Cohen, an Individual, Doing Business as American Footwear Co., Bankrupt, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 22-28) is reported at *Warner v. Dworsky, et al.* (1951), 98 Fed. Supp. 466. The opinion of the Court of Appeals (R. 32-39) is

reported at *Warner v. Dworsky, et al.* (C. C. A. 8th), 194 Fed. (2d) 277.

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1952 (R. 40). The petition for a writ of certiorari was filed on April 19, 1952. The jurisdiction of this Court is invoked under Section 47c of Title 11, U. S. C., and under Sections 1254 and 2101 of Title 28, U. S. C.

QUESTION PRESENTED

Whether, pursuant to an alleged conspiracy to defraud creditors of a bankrupt, transfers by assignees for the benefit of creditors who procured an assignment from the bankrupt of his property by alleged false and fraudulent representations (and which transfers under the laws of the state of Minnesota are allegedly fraudulent as against and voidable by the bankrupt's creditors) constitute transfers "suffered by" a bankrupt within the meaning of Section 70e of the Bankruptcy Act as amended.

It is the contention of respondent that the "alleged plan" referred to under the heading QUESTION PRESENTED of petitioners' petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit (page 2) was not one to defraud the bankrupt but rather to defraud the creditors of the bankrupt.

STATUTES INVOLVED

The applicable statutes are printed in the appendix, infra, page 10.

STATEMENT OF THE CASE

The complaint alleged, and the defendants' motion to dismiss (R. 17-21) admitted, the following pertinent facts:

On April 5, 1948, Hyman Cohen, an individual, doing business as American Footwear Co., was adjudged a bankrupt in the United States District Court for the District of Minnesota, Fourth Division (R. 1). Respondent was appointed trustee on May 23, 1948, and immediately thereafter qualified as such trustee (R. 1).

Thereafter respondent, C. E. Warner, as trustee in bankruptcy of Hyman Cohen, an individual, doing business as American Footwear Co., bankrupt, filed his amended complaint in the same court against the defendants to reclaim and recover certain property of the bankrupt (or, in the alternative, to collect its value) because of certain transfers alleged to have been made and suffered by the bankrupt prior to bankruptcy, which it was alleged, under the laws of the state of Minnesota, were fraudulent as against and voidable by creditors of the bankrupt having claims provable under the Bankruptcy Act as amended, and null and void as against the respondent (R. 7-9). Jurisdiction of the United States District Court was invoked under Section 70e of the Bankruptcy Act as amended, 11 U. S. C. A., Sec. 110e (R. 1).

That a conspiracy was entered into between the defendants and one A. P. Saltzman (not a party to this action because of his non-residence and the consequent lack of jurisdiction of the District Court over him), to wrongfully and unlawfully hinder, delay and defraud creditors of the bankrupt having claims provable under

the Bankruptcy Act and to cause transfers of non-exempt property of the bankrupt appropriable to the payment of claims of said creditors to be made and suffered by the bankrupt, which said transfers, under the law of the state of Minnesota applicable thereto, would be fraudulent against said creditors and voidable by them (R. 3).

The complaint further alleged overt acts pursuant to the conspiracy, participated in by all the defendants and said Saltzman, by which property of the bankrupt aggregating in value approximately one hundred fifty-seven thousand dollars ($157,000.00) was transferred and suffered to be transferred by the bankrupt to defendants, said Saltzman and a firm known as Sales Enterprises (not a party to the action), the transfers having been made by the defendants Sachs, Nathanson and Lifson as common law assignees under a so-called trust deed or a common law assignment for the benefit of creditors, made, executed and delivered to them by the bankrupt at a time concededly more than four (4) months prior to bankruptcy (R. 4-5, 9-13).

It was further alleged that the trust deed was obtained from the bankrupt by fraud and false representations and concealments (R. 4-5).

It was further alleged that at all times material the defendant Sachs was attorney for and representing defendant North Union Co. and defendant Nathanson was attorney for and representing defendant Wright and the said Saltzman and the partnerships of which they were members (R. 3).

It was alleged that the transfers were made without a fair consideration and the bankrupt was thereby ren-

dered insolvent, that the transfers were made with an intent on the part of the common law trustees, while in possession and in control of the property and estate of the bankrupt and purporting to act under the so-called trust deed, to hinder, delay and defraud the creditors of the bankrupt; that the transferees had previous notice and full knowledge of the fraudulent intent of the common law trustees in making the transfers, all in violation of the laws of the state of Minnesota applicable thereto (R. 6-7).

While the defendants North Union Co. and Wright interposed answers (R. 13-14, 15-16) motions to dismiss for lack of jurisdiction, filed by each of the defendants (R. 17-21), were granted by the District Court (R. 22-28).

The District Court in dismissing the action for lack of jurisdiction reversed its previous decision rendered in the same case, *Warner v. Dworsky, et al.*, 91 Fed. Sup. 884 (R. 28).

On January 29, 1952, the Court of Appeals filed its opinion reversing the District Court (R. 32-39). Judgment of affirmance was entered the same day (R. 40). The Court of Appeals was of the opinion "that the jurisdiction of the courts of bankruptcy was broadened by the amendment made to former Section 70e, and that the word 'suffered' may not be held meaningless because of the legislative history of the revised section," or, that there was "no need to refer to legislative history where statutory language is sensible and unambiguous" (R. 36).

SPECIFICATION OF ERRORS URGED

In compliance with Rule 27 (4) of the Revised Rules of the Supreme Court of the United States as amended, respondent is not stating any specification of errors except to point out that petitioners' specification of errors No. 3, namely:

> "3. The court below erred in failing to hold that the transfers so made were not transfers 'made' by the bankrupt in fraud of creditors within the reach of Section 70e of the National Bankruptcy Act as amended."

refers to a proposition which the Court of Appeals expressly stated that it was not necessary for it to decide (R. 39).

ARGUMENT

The issue in the instant case is a very narrow one, based upon a unique fact situation, and no amount of strained semantics can convert it into one warranting review by this Court on certiorari. Our research has failed to disclose, in all the years of administration of the Bankruptcy Act, a single reported decision in which the fact situation was even closely analogous to that presented by the instant case. Certainly the decisions cited in the petition (page 7) are no exceptions. *Park v. Cameron,* 273 U. S. 616, involved a mulct of a corporation by its officers and directors. The same was true in *Siegel v. Municipal Capital Corp.* (C. A. 2), 102 Fed. (2d) 905. In *Waite v. Gottstein* (D. C. Wash.), 224 Fed. 281, property had been forcibly seized from a bankrupt, and in *Harris v. First National Bank,* 216 U. S. 382, there clearly had been no fraudulent transfer by the bankrupt or by his agents but the bank was refusing to surrender property belonging to the bankruptcy estate.

THE DECISION BELOW IS CLEARLY CORRECT

The decision below is clearly correct and not in conflict with any other decision. Even petitioners are not prepared to state that the decision below is in conflict with any other decision, but merely contend that the principles upon which the decision is based are in probable conflict with those heretofore enunciated by this Court.

What petitioners ask is not a construction of a statute, but, in effect, a restriction of it by the Court, so that what was included, presumably intentionally, may be excluded from its scope. The decision of the Court below gives effect to the plain language of the statute.[1] It is not in conflict with the definition of "transfer" contained in Section 1 (30) of the Bankruptcy Act (11 U. S. C. Sec. 1 (30)), but rather is in harmony and union with the definition of "transfer" as amended by the Chandler Act and especially with that portion of the definition containing the terms "voluntarily or involuntarily," which appears in the definition of "transfer" for the first time in that act.

While there is no comment in the reports of the committees considering the Chandler Act or in congressional debates, prior to the passage of that act as to the reason for the addition of the word "suffered," the action occurred in the process of developing a workable reorgan-

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[1]See Felix Frankfurter's "Some Reflections on Reading of Statutes," 47 Columbia Law Review, pp. 527-546 at 533:

> "A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations of the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction."

ization of the Bankruptcy Act and in conjunction with the expansion of the phraseology of the definition of "transfer," all in effectuating a statutory scheme.[2]

Petitioners' contention that the definition of "transfer" in Section 1 (30) was not intended to give uniformity of meaning to that word wherever used in the Act is in direct conflict with Section 1 of the Bankruptcy Act (11 U. S. C. A., Sec. 1).[3]

The decision of the court below effectuates statutory policy and purpose as previously indicated by this Court in pointing out that not only the Chandler Act but general legislation relating to bankruptcy between 1898 and 1938 had been indicative of the policy of Congress to enlarge rather than restrict the jurisdiction of Federal Courts. *Williams v. Austrian,* 331 U. S. 642; 2 *Colliers on Bankruptcy* (14th Ed.), Sec. 23.15, p. 571, footnote 5. The lack of appropriate fanfare by references in committee reports, congressional debates and literature to herald the enlargement of jurisdiction of Federal Courts is not a criterion of statutory policy and purpose. As indicated by Mr. Chief Justice Vincent in *Williams v. Austrian,* 331 U. S. 642, 661:

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[2]Analysis of H. R. 12889, p. 7. Mr. Weinstein in referring to the expanded phraseology of the definition of "transfer" states:

> "The final phrase, beginning with 'as,' appears in part in the present act, and has likewise been expanded; but in view of the inclusiveness of the preceding portion of the revised definition, its retention would seem unnecessary, and its elimination might be advisable."

This indicates that it was the intention to give the definition of "transfer" such an all-embracing and inclusive meaning so that it would not be necessary to itemize the various means by which transfers are effectuated.

[3]Section 1 of the Bankruptcy Act (11 U. S. C. A. Sec. 1) provides:

> "The words and phrases used in this Act and in proceedings pursuant thereto shall, unless the same be inconsistent with the context, be construed as follows:"

> "Congress need not document its specific actions in elaborate fashion in order to direct this court's attention to statutory policy and purpose."

The National Bankruptcy Conference in preparing an analysis of a predecessor bill to that introduced by Mr. Chandler for the judiciary committee of the House of Representatives, indicated in its preface that the eighth purpose which the bill sought to accomplish was (Analysis of H. R. 12889, p. 5 V):

> "To make clear the provisions relative to the jurisdiction of Bankruptcy Courts, and to extend them to cover additional matters, including suits by receivers, the determination of dower rights, the removal of bankruptcy trustees, the limitation of ancillary proceedings, and the surrender of or accounting for assets by assignees or receivers or trustees appointed in other proceedings in certain cases."

The reasons assigned by the Court of Appeals for its decision are so sufficiently stated as to require no further argument.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Applicable Statutes

Section 70e of the National Bankruptcy Act as amended by the Act of June 22, 1938, commonly known as the Chandler Act (c. 575, Sec. 70e, 52 Stat. 882, 11 U. S. C., 1946 ed., Sec. 110e) provides:

> "e. (1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act, which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor.
>
> "(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whomever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision e is valid under applicable Federal or State laws.
>
> "(3) For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction." 11 U. S. C., 1946 ed., Sec. 110e.

Prior to the amendment by the Chandler Act, Section 70e of the 1898 Bankruptcy Act (c. 541, Sec. 70e, 30 Stat. 566, as amended by Act of February 5, 1903, c. 487, Sec.

16, 32 Stat. 800, 11 U. S. C., 1934 ed., Sec. 110e), provided:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." 11 U. S. C., 1934 ed., Sec. 110e.

Section 1 (30) of the National Bankruptcy Act as amended by the Act of June 22, 1938, commonly known as the Chandler Act (11 U. S. C., Chap. 1, Sec. 1 (30)) provides:

> "SECTION 1. MEANING OF WORDS AND PHRASES. The words and phrases used in this title and in proceedings pursuant thereto shall, unless the same be inconsistent with the context, be construed as follows:
>
> "(30) 'Transfer' shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security or otherwise;"

Prior to the amendment by the Chandler Act, Section 1 (25) of the 1898 Bankruptcy Act, as amended (11 U. S. C., 1934 ed., Sec. 1 (25)), provided:

"SECTION 1. MEANING OF WORDS AND PHRASES. The words and phrases used in this title and in proceedings pursuant thereto shall, unless the same be inconsistent with the context, be construed as follows:

"(25) 'Transfer' shall include the sale and every other and different mode of possessing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."